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(3) FISH & RICHARDSON 6175428906

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Attorney's Docket No.: 08914-009001

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Applicant : Peter M. Perthou
Serial No. : 09/752,015
Filed : December 29, 2000

Art Unit : 3627
Examiner : Suzanne Dino Barrett

Title : KEY RING

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Attached to this facsimile communication cover sheet is an Amended Second Appeal Brief, faxed this 19th day of June, 2006, to the United States Patent and Trademark Office.

Respectfully submitted,
FISH & RICHARDSON P.C.

Date: June 19, 2006

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Attorney's Docket No.: 08914-009001

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant : Peter M. Perthou
Serial No. : 09/752,015
Filed : December 29, 2000
Title : KEY RING

Art Unit : 3627
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Alexandria, VA 22313-1450

AMENDED SECOND APPEAL BRIEF

(i) *Real party in interest.*

Peter M. Perthou.

(ii) *Related appeals and interferences.*

A first Notice of Appeal was filed on January 23, 2003, and the first Appeal Brief was mailed on April 28, 2003. Decisions on appeal, none.

(iii) *Status of claims.*

Claims 1-11 stand rejected over the claim of U.S. Design Patent No. D435,720. Claims 1, 6 and 11 stand rejected under 35 U.S.C. §103(a) as unpatentable over Chen as a primary reference in view of Jung as a secondary reference and Momemers or Sheldon as a tertiary reference and claims 2-5 and 7-10 stand rejected under 35 U.S.C §103(a) further in view of Miller as a quaternary reference.

(iv) *Status of amendments.*

No amendment was filed subsequent to the second final rejection.

(v) *Summary of claimed subject matter.*

The invention is a keyring having a key-holding ring, such as 12, a band, such as web 13, a D-ring, such as 11, coupling the band to the key-holding ring. The D-ring has a U-shaped

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portion, such as legs 11A, 11B and bight 11C, engaging the key-holding ring and a bar, such as 11D, between the ends of the U-shaped portion and engaging the band. The band may be a web of material having ends looped through the D-ring and joined at the ends. There may be a clamp, such as 18, at the ends of the web of material. The web may have portions that are fastened together for most of their length to define an opening accommodating the bar of the D-ring so that the D-ring may rotate about the axis of the bar through an angle of nearly 360 degrees, and the key-holding ring may ride along the inside portion of the U-shaped portion of the D-ring about an axis perpendicular to the axis of the bar and perpendicular to the band for substantially 180 degrees. The clamp width may be substantially the same as the width of the band. The key-holding ring may be a spiral ring of material having a cross-sectional span with ends and the bar formed with a gap, such as 11E, intermediate the ends of width about that of the span to allow the key-holding ring to pass through the gap into the D-ring during assembly.

A method of making the key ring includes passing the key-holding ring through the gap into the D-ring, and passing the band through the D-ring. Pages 2-3.

(vi) *Grounds of rejection to be reviewed on appeal.*

1. Whether claims 1-11 are unpatentable over Design Patent No. D435,720 when the narrow design patent claim is patentable over claims 1-11.

2. Whether the differences between the subject matter of claims 1, 6 and 11 and what is disclosed in the primary, secondary and tertiary references are such that the subject matter as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made when the references failed to suggest the desirability of combining what is there disclosed to meet the limitations of these claims.

3. Whether the differences between the subject matter of claims 2-5 and 7-10 and what is disclosed in the primary, secondary, tertiary and quaternary references are such that the subject matter as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made when these four references fail to suggest the desirability of combining what is there disclosed to meet the limitations of these claims.

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(vii) *Argument.*

I. CLAIMS 1-11 ARE REJECTED UNDER THE JUDICIALLY CREATED DOCTRINE OF OBVIOUSNESS-TYPE DOUBLE PATENTING AS BEING UNPATENTABLE OVER THE CLAIM OF U.S. DESIGN PATENT NO. D435,720.

The final action states:

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Long*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-11 are rejected under the judicially created doctrine of obviousness type double patenting as being unpatentable over the claim of U.S. Design Patent No. D435,720. Although the conflicting claims are not identical, they are not patentably distinct from each other because the design patent clearly shows all of the claimed structure of the instant utility patent application and the utility patent claims all of the structure shown in the design patent as evidenced by the identical drawings figures in both the utility application and the design patent. Accordingly, two-way obviousness determination is satisfied. P.2.

6. Applicant's arguments filed 8/30/05 have been fully considered but they are not persuasive. Firstly, with respect to Applicant's arguments regarding the double patenting rejection, it is maintained that the drawing figure shown and claimed in design patent D435,720 covers the structure set forth in the claims of the instant application, and therefore, the two-way obviousness determination is satisfied. Applicant's arguments that the instant claim is broader does not overcome the rejection, since the structure of claim 1 is clearly shown in the drawings (and therefore claimed) in the design patent. Applicant has not claimed any limitation which is not shown in the drawings such as a particular material, flexibility, etc, which would overcome the rejection. P.4.

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In order to support a rejection of claims for double patenting based on a design patent, double patenting can be found only if the claims of the two patents either cross-read or constitute obvious variations in both directions. *In re Dembiczak*, 175 F. 3d 994, 1002-03 (Fed. Cir. 1999). Design patent D435,720 is restricted to "The ornamental design for a key ring, substantially as shown and described." Claim 1 in this application, for example, is considerably broader in calling for a key-holding ring, a band, a D-ring coupling said band to said key-holding ring, said D-ring having a U-shaped portion engaging the key-holding ring and a bar between the ends of the U-shaped portion and engaging the band. The claimed structure and claimed method are not limited to the ornamental design of the design patent, and the narrow claim to the ornamental design in the design patent is plainly patentable over the utility application claims. That the drawing figures are the same does not support a conclusion that the claims of the design patent and the utility patent constitute obvious variations in both directions. A device could be constructed that would infringe the claims of the utility patent but not the very narrow claim of the design patent. *Shelcore, Inc. v. Durham Industries Inc.*, 223 U.S.P.Q. 584 (Fed. Cir. 1984).

II. CLAIMS 1,6,11 ARE REJECTED UNDER 35 U.S.C. 103(A) AS BEING UNPATENTABLE OVER CHEN 5,069,050 IN VIEW OF JUNG 4,903,514, AND MOMEMERS 4,523,443 OR SHELDON 4,601,185.

The final action states:

4. Claims 1,6,11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chen 5,069,050 in view of Jung 4,903,514, and Momemers 4,523,443 or Sheldon 4,601,185. Chen teaches a flexible web band member 16 having a key ring 12 attached to one end. Jung teaches a keyholder comprising an intermediate member between the member 11 and key ring 15 in the form of a D-ring having a "V" shaped portion connecting one end of the band and the key ring. The D-ring further comprises a gap portion to be attached to the band and a clip means 20/21/22 to clamp the other end of the band together. Jung fails to teach a D-ring having a "U" shaped portion. Momemers teaches a similar key ring comprising a D-ring with a "U" shaped portion 3. Or alternatively, Sheldon teaches both "V" and "U"-shaped rings in Figure 2. It would have been considered an obvious matter of design choice to one of ordinary skill in the art to provide an intermediate member between the band and key ring of Chen as taught by Jung since it well known in the key ring art to provide as many intermediate members as desired due to the ease of attaching multiple rings together, and further to substitute a "U" shape for the "V" shaped D-ring of Jung since the varying shapes of rings are well known and there is no criticality afforded the U-shape.

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Furthermore, the method limitations of claim 11 are considered inherent to the device of Chen, as modified by Jung, and Momemmers or Sheldon. Pp.3-4.

[T]he Chen '050 reference is applied against the claims as the primary reference teaching a flexible band and a key ring. It is well known in the keyholder art that multiple rings may be attached in series, as desired, to continually add more keys to the keyholder and thus, providing an intermediate member (or several) between the band and the key ring would have been considered obvious to one of ordinary skill in the art in order to accomodate more keys. The suggestion provided in Jung is that intermediate members can be added for mounting additional key rings in order to accomodate more keys. Thus, the conclusion is that given such a teaching, it would have been obvious to provide the keyholder of Chen with an intermediate member for attaching additional key rings. Furthermore, it has been long held that modifying the shape of a structural member, absent a disclosure of criticality of such shape, would have been obvious to one of ordinary skill in the art, especially when the prior art teaches such varying shapes (as evidenced by the cited prior art). Thus, modifying the shape of the intermediate member would have been considered an obvious matter of design choice. Furthermore, the Miller '137 patent clearly teaches a web band having most of its length fastened together and its ends clamped together and fastened by stitching as discussed above. In addition, Applicant's arguments regarding the method limitations of claim 11 are not persuasive. The assembly of the band, D-ring and key ring would have been considered inherent to the use of the device given the rejection of the structure of the device set forth above. Therefore, Applicant's argument that the Examiner has not provided sufficient motivation to combine these references is not persuasive. It is maintained that the discussion above, clearly sets forth the motivation to combine the elements set forth in Chen, Jung, Miller, Sheldon and Momemmers. Accordingly, claims 1-11 stand finally rejected under 35 USC 103. Pp.5-6.

We set forth binding authorities repeated in our First Appeal Brief which were never mentioned by the Examiner in any office action.

"The mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification." *In re Gordon*, 221 U.S.P.Q. 1125, 1127 (Fed. Cir. 1984).

Although the Commissioner suggests that [the structure in the primary prior art reference] could readily be modified to form the [claimed] structure, "[t]he mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification." *In re Laskowski*, 10 U.S.P.Q. 2d 1397, 1398 (Fed. Cir. 1989).

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"The claimed invention must be considered as a whole, and the question is whether there is something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination." *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick*, 221 U.S.P.Q. 481, 488 (Fed. Cir. 1984).

Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under Section 103, teachings of references can be combined only if there is some suggestion or incentive to do so. *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 221 U.S.P.Q. 929, 933 (Fed. Cir. 1984) (emphasis in original, footnotes omitted).

"The critical inquiry is whether there is something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination." *Fromson v. Advance Offset Plate, Inc.*, 225 U.S.P.Q. 26, 31 (Fed. Cir. 1985).

As the Federal Circuit Court of Appeals said in *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999):

Close adherence to this methodology is especially important in the case of less technologically complex inventions, where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher."

And in *In re Kotzab*, 55 U.S.P.Q.2d 1313, 1316 (Fed. Cir. 2000), the Court said:

[I]dentification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention. *See id.* [*Dembiczak*]. Rather, to establish obviousness based on a combination of the elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant. *See In re Dance*, 160 F.3d 1339, 1343, 48 U.S.P.Q.2d 1635, 1637 (Fed. Cir. 1998), *In re Gordon*, 733 F.2d 900, 902, 221 U.S.P.Q. 1125, 1127 (Fed. Cir. 1984). Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference. *See B. F. Goodrich Co. v. Aircraft Braking Sys. Corp.*, 72 F.3d 1577, 1582, 37 U.S.P.Q.2d 1314, 1318 (Fed. Cir. 1996).

We take this occasion to explain what precedents are considered binding in proceedings in the Patent and Trademark Office (PTO). Where the Court of

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Appeals for the Federal Circuit has addressed a point of law in a published opinion, the Federal Circuit's decision is controlling. Similarly controlling are decisions considered to be binding precedent by the Federal Circuit, i.e., decisions of the former Court of Claims and the former Court of Customs and Patent Appeals, as well as the former Customs Court. See *South Corp. v. United States*, 690 F.2d 1368, 215 USPQ 657 (Fed. Cir. 1982)(in banc); *Bar Zell Expeditors, Inc. v. United States*, 698 F.2d 1210, 1211 n. 4 (Fed. Cir. 1983). In those relatively rare cases where the Federal Circuit has not addressed an issue, but there is "authorized published" Board precedent, that published Board precedent is binding on panels of the Board and Examiners in the Patent Examining Corps. *Ex parte Holt*, 19 U.S.P.Q. 2d 1211, 1214 (BPA&I 1991).

If this ground of rejection were repeated, the Examiner was respectfully requested to associate each element in each rejected claim with corresponding elements in the references, and quote verbatim the language in the references regarded as suggesting the desirability of combining what is there disclosed to meet the terms of the claims. The Examiner did not and can not comply with this request.

Nor do the primary, secondary and tertiary references suggest the desirability of combining what is there disclosed to form the key-holding ring of a spiral ring of material having a cross-sectional span with ends and the bar formed with a gap intermediate the ends of width about that of the cross-sectional span to allow the key-holding ring to pass through the gap into the D-ring during assembly as called for by claims 6.

Nothing in the references remotely suggests the desirability of combining what is there disclosed to meet the terms of the rejected claims. Furthermore, the contention that it would have been "considered an obvious matter of design choice to one of ordinary skill in the art to provide an intermediate member between the band and keyring" of the primary reference as said to be taught by the secondary reference is a conclusion, not a proper reason for sustaining a rejection under Section 103.

In *In re Garrett*, 33 PTCJ 43 (BPA&I, September 30, 1986) the Board criticized the Examiner's statement that the proposed modification would have been "an obvious matter of engineering design choice" as a conclusion, not a reason, in reversing the section 103 rejection.

The rejection of method claim 11 as inherent to the device assembled from three references by hindsight is improper. "In the absence of the article in the prior art we find no

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basis for the conclusion that the manipulative steps of assembling the nonexistent article would be obvious." *Ex parte Rubin*, 127 U.S.P.Q. 286, 287 (Bd. of Appeals 1959).

Here, the Examiner relied upon hindsight to arrive at the determination of obviousness. It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious.¹⁵ This court has previously stated that "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention."¹⁶ *In re Fritsch*, 23 U.S.P.Q. 2d 1780, 1784 (Fed. Cir. 1992).

¹⁵ *In re Gorman*, 933 F.2d 982, 987, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991). See also *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138, 227 USPQ 543, 547 (Fed. Cir. 1985).
¹⁶ *In re Fine*, 837 F.2d at 1075, 5 USPQ2d at 1600.

III. CLAIMS 2-5,7-10 ARE REJECTED UNDER 35 U.S.C. 103(A) AS BEING UNPATENTABLE OVER CHEN IN VIEW OF JUNG AND MOMEMERS OR SHELDON, AS APPLIED TO CLAIM 1 ABOVE, AND FURTHER IN VIEW OF MILLER 1,704,137.

The final action states:

5. Claims 2-5,7-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chen in view of Jung and Momemmers or Sheldon, as applied to claim 1 above, and further in view of Miller 1,704,137. Chen fails to teach the ends of the band being joined together as set forth in claim 2. Miller teaches a band 12/14 looped through a key ring 20, fastened along most of its sides by snaps 28 or alternatively by stitching 30, and joined at its ends by a clamp means comprised of stitching 16/30 extending along the entire width of the band. It would have been obvious to one of ordinary skill in the art to modify the band of Chen by providing a fastening along most of its length and stitch clamp means for joining the ends as taught by Miller as a well known alternative manner of constructing the band member and providing strengthening means by doubling up on most of the length, rather than the shortened leg 18D.18E of Chen. P.4.

Claims 2-5 and 7-10 are dependent upon and include all the limitations of parent claim 1, and the reasoning set forth above in support of the patentability of claim 1 over the primary, secondary and either tertiary reference is submitted to support the patentability of claims 2-5 and 7-10 so that further discussion of the quaternary reference is submitted to be unnecessary.

Furthermore, the contention that the quaternary reference can be used in rejecting these claims because providing a clip type clamp as said to be taught by the quaternary reference is an

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obvious matter of design choice is a conclusion, not a reason for rejecting claims under section 103.

Still further, there is no suggestion in the primary, secondary, either tertiary reference and the quaternary reference of the desirability of combining what is disclosed in these five references to make the band a web of material having ends looped through the D-ring and joined at the ends as called for by claim 2.

Nor do any of the five references suggest the desirability including a clamp at the ends of the web of material as called for by claim 3.

Nor do any of the five references suggest the desirability of having the web with portions that are fastened together for most of their length to define an opening accommodating the bar of the D-ring so that the D-ring may rotate about the axis of the bar through an angle of nearly 360 degrees and the key-holding ring may ride along the inside portion of the U-shaped portion of the D-ring about an axis perpendicular to the axis of the bar and perpendicular to the band for substantially 180 degrees as called for by claim 4.

Nor do the five references suggest the desirability of combining what is there disclosed to form the key-holding ring of a spiral ring of material having a cross-sectional span with ends and the bar formed with a cap intermediate the ends of width about that of the cross-sectional span to allow the key-holding ring to pass through the gap into the D-ring during assembly as called for by claims 7-10.

If this ground of rejection were repeated, the Examiner was respectfully requested to quote verbatim the language in each reference regarded as corresponding to each limitation in the rejected claims and quote verbatim the language in the references regarded as suggesting the desirability of combining what is there disclosed to meet the limitations of these claims. The Examiner did not and could not comply with this request.

CONCLUSION

In view of the foregoing authorities, reasoning and the inability of the prior art to make obvious the subject matter as a whole of the claimed invention, the decision of the Examiner finally rejecting all the claims should be reversed. If the Board believes a claim may be allowed in amended form, the Board is respectfully requested to include an explicit statement that such a

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claim may be allowed in such amended form and direct that Appellant shall have the right to amend in conformity with such statement in the absence of new references or grounds of rejection.

The brief fee was enclosed with the first appeal brief and is not believe to be required for this second appeal brief. Please apply any other charges or credits to Deposit Account No. 06-1050, Order No. 08914-009001.

Respectfully submitted,
FISH & RICHARDSON P.C.

Date: 19 June 2006

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Enclosures: Figures 1-5

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(viii). *Claims appendix.*

1. A key ring comprising
a key-holding ring,
a band,
a D-ring coupling said band to said key-holding ring,
said D-ring having a U-shaped portion engaging the key-holding ring and a bar between the ends of the U-shaped portion and engaging the band.
2. A key ring in accordance with claim 1 wherein the band is a web of material having ends looped through the D-ring and joined at said ends.
3. A key ring in accordance with claim 2 and further comprising a clamp at the ends of said web of material.
4. A key ring in accordance with claim 2 wherein the web has portions that are fastened together for most of their length to define an opening accommodating the bar of the D-ring so that the D-ring may rotate about the axis of the bar through an angle of nearly 360 degrees and the key-holding ring may ride along the inside portion of the U-shaped portion of the D-ring about an axis perpendicular to the axis of the bar and perpendicular to the band for substantially 180 degrees.
5. A key ring in accordance with claim 3 wherein the clamp width is substantially the same as the width of the band.
6. A key ring in accordance with claim 1 where said key-holding ring is a spiral ring of material having a cross-sectional span with ends and said bar is formed with a gap intermediate said ends of width about that of said span to allow said key-holding ring to pass through said gap into said D-ring during assembly.
7. A key ring in accordance with claim 2 wherein said key-holding ring is a spiral ring of material having a cross-sectional span and said bar has ends and is formed with a gap

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intermediate said ends of width about that of said span to allow said key-holding ring to pass through said gap into said D-ring during assembly.

8. A key ring in accordance with claim 3 wherein said key-holding ring is a spiral ring of material having a cross-sectional span and said bar has ends and is formed with a gap intermediate said ends of width about that of said span to allow said key-holding ring to pass through said gap into said D-ring during assembly.

9. A key ring in accordance with claim 4 wherein said key-holding ring is a spiral ring of material having a cross-sectional span and said bar has ends and is formed with a gap intermediate said ends of width about that of said span to allow said key-holding ring to pass through said gap into said D-ring during assembly.

10. A key ring in accordance with claim 5 wherein said key-holding ring is a spiral ring of material having a cross-sectional span and said bar has ends and is formed with a gap intermediate said ends of width about that of said span to allow said key-holding ring to pass through said gap into said D-ring during assembly.

11. A method of making a key ring that includes a key-holding ring that is a spiral ring of material having a cross-sectional span, a band, a D-ring coupling said band to said key-holding ring and having a U-shaped portion engaging the key-holding ring and a bar having bar ends between the ends of the U-shaped portion formed with a gap intermediate said bar ends of width about that of said span to allow said key-holding ring to pass through said gap into said D-ring during assembly, comprising,

passing the key-holding ring through the gap into the D-ring,

and passing the band through the D-ring.

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(ix) Evidence appendix.

None.

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(x) Related proceedings appendix.

None.